1979

State of Utah v. Daniel A. Temple : Brief of Respondent

Utah Supreme Court

Daniel A. Temple; Pro Se;
Robert B. Hansen; Attorney General;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No.

DANIEL A. TEMPLE, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF CONVICTION
THIRD JUDICIAL DISTRICT COURT ON MAY 22,
THE HONORABLE DAVID B. DEE, PRESIDING

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 16522

DANIEL ALLEN TEMPLE, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with two felonies--Possession of a Stolen Motor Vehicle in violation of § 41-1-112, Utah Code Ann., (1953, as amended), and Theft in violation of § 76-6-404, Utah Code Ann., (1953, as amended), to which he pleaded not guilty (R. 10). He was later charged with the Class A misdemeanor offense of Attempted Possession of a Stolen Motor Vehicle, to which appellant pleaded guilty (R. 8, 21).

DISPOSITION IN THE LOWER COURT

Appellant was sentenced by Judge David B. Dee on May 23, 1979, in the Third Judicial District, in and for Salt Lake County, State of Utah, to a term of 11 months, such term "to run consecutively with the present sentence and concurrently with the sentence of Judge Gowans" (R. 28), who had so sentenced appellant on May 2, 1979 for Failure to Respond to an Officer's Signal to Stop, also a Class A misdemeanor (R. 38 and Appellant's Brief at p. 1).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgments and sentence of the lower court.

STATEMENT OF THE FACTS

Inasmuch as this appeal is limited to a review of a court's consecutive sentencing power, and inasmuch as appellant pleaded guilty to the offense charged in the information, no transcript was made of the proceedings and thus this sketchy statement of facts is derived solely from the trial court's record.

On January 28, 1979, a motor vehicle was stolen from the Budget Rent-A-Car parking lot. On or about February 1, 1979, appellant was observed driving a 1979 Mercury automobile, serial number 9Z64F618790, in an unlawful manner

and committed a traffic violation (R. 5, 7). Salt Lake County Sheriff deputies pursued the appellant and a collision resulted at 950 East North Union Boulevard (R. 5, 7). A search of Budge Rent-A-Car's records revealed that the car stolen from its lot on January 28 was the car in appellant's possession on February 1, 1979.

Appellant was originally charged with two felonies--Possession of a Stolen Motor Vehicle, in violation of Utah Code Ann., § 41-1-112 (1953, as amended), a third-degree felony, and Theft, in violation of § 76-6-404, Utah Code Ann., (1953, as amended), a second-degree felony (R. 5, 7), to both of which appellant pleaded not guilty (R. 10).

After a sequence of "plea bargaining" meetings, the State agreed to reduce the charges to a single offense of Attempted Possession of a Stolen Motor Vehicle, which reduced the third-degree offense to a Class A misdemeanor (see § 76-4-102(4), Utah Code Ann., (1953, as amended)).

On May 23, 1979, the appellant entered his written and signed guilty plea to Judge David B. Dee and was sentenced "consecutively with the present sentence and concurrently with the sentence of Judge Gowans" (R. 28). Appellant's present sentence was an undescribed felony conviction which

appellant was serving for ten years (December 1, 1969 to November 30, 1979) (R. 38). The "sentence of Judge Gowans" was a sentence received on May 2, 1979, also for a Class A misdemeanor offense of Failure to Respond to an Signal to Stop (R. 38 and Appellant's Brief, p. 1).

ARGUMENT

POINT I.

UTAH CODE ANN., § 76-3-401 GIVES A COURT AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES WHERE A DEFENDANT HAS BEEN ADJUDGED GUILTY OF TWO OR MORE OFFENSES.

Appellant's contention in his first point is that a strict reading of Utah Code Ann., § 76-3-401(1) (1953, as amended), forbids the imposition of consecutive sentences where both offenses are not felonies. While true, the subsection does state that ". . . a court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences a fuller reading of the statute reveals that a court may consider other circumstances of the offenses in deciding whether to impose either a consecutive or concurrent sentence. A complete reading of § 76-3-401(1) reveals:

> Subject to the limitations of subections (2) through (5), a court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose

> concurrent or consecutive sentences for the offenses. Sentences shall run concurrently unless the court states, in the sentence, that they shall run consecutively.

Emphasis added.

Thus, this subsection must be read in conjunction with subsections (2) through (5) and hence, all phrases of subsection (1) must be tempered with the full thrust of these other four subsections.

Subsection 76-3-401(2) is most dispositive of this appeal. It reads:

> A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

In the present case, appellant's criminal history and character and the circumstances of the present offense(s) all weigh heavily against him and support the court's ruling. It is particularly noteworthy that appellant was originally charged with two felonies--Possession of a Stolen Motor Vehicle in violation of § 41-1-112, Utah Code Ann., (1953, as amended), a third degree felony, and Theft by Receiving in violation of § 76-6-404, Utah Code Ann., (1953, as amended), a second degree felony (R. 5, 7). As noted in the Statement of Facts, supra, a plea bargain process resulted in appellant pleading guilty to the class

A misdemeanor offense of Attempted Possession of a Stolen Motor Vehicle (R. 8 and 21). Thus, this sequence of defense maneuvers weighed heavily against appellant inasmuch as § 76-3-401(2) allows a court to consider such extrinsic factors in determining how a defendant is to be sentenced (See Statement of Facts, supra).

Appellant also construes subsection (4) of § 76-3-401 to imply that "some courts are not 'lawfully determined' to impose a consecutive sentence." Respondent submits that this interpretation is inaccurate. Subsection (4) reads:

> If a court lawfully determined to impose consecutive sentences, the aggregate minimum of all sentences imposed may not exceed twelve years' imprisonment and the aggregate maximum of all sentences imposed may not exceed thirty years' imprisonment. However, this limitation does not apply if an offense for which defendant is sentenced authorizes the death penalty or life imprisonment.

The intent of this subsection is that where a court has decided, in its best view of the facts and legal issues of the case, that a consecutive sentence is appropriate, then the limitations above quoted in subsection (4) apply. Appellant asks this Court to make a strained reading of the subsection by suggesting that some courts are authorized to impose consecutive sentences and others are not. This view is without merit.

The recent case of State v. Beck, 584 P.2d 870 (Utah, 1978), gives support to respondent's position. In Beck, appellant argued that the court erred in imposing consecutive sentences by not properly following the requirements of § 76-3-401(2). This Court answered that claim by ruling:

> Beck relies on Title 76-3-401(2) of the Code to urge that the court in a consecutive sentence situation is duty bound to "consider the gravity and circumstances of the offenses." The Court complied, ordering a diagnostic report before sentence, and although it is not in the record, Beck did not show that it did not indicate other than that it led the court to consider the gravity of the offenses and it must, therefore be presumed that the court did what the statute proscribed [sic]. This, strengthened with the substantive rule of discretion on the part of the court to determine concurrent or consecutive sentencing, dispels any claim of error by defendant.

584 P.2d at 872.

Much the same circumstances are present in the instant case. Although the record here is also silent as to whether the court did indeed consider the facts, history and circumstances of the offense as required by § 76-3-401(2), this Court may presume (as was done in Beck), that such consideration was made. Thus, respondent urges this Court to again rule as was done in Beck, that the lower court here may, in its discretion, impose a consecutive sentence on appellant.

POINT II

UTAH CODE ANN. § 77-35-14, WHICH ALLOWS A COURT TO IMPOSE CONSECUTIVE SENTENCES UPON A DEFENDANT BEFORE JUDGMENT ON EITHER, DOES NOT RESTRICT A COURT FROM IMPOSING A CONSECUTIVE SENTENCE WHERE TWO OFFENSES WERE COMMITTED TEN YEARS APART.

Appellant contends that Utah Code Ann. § 77-35-14 (1953), as amended, must be read so as to limit a court's ability to impose consecutive sentences for multiple offenses only where neither offense's judgment has been rendered. The statute reads:

> If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses.

Respondent submits that the intent of this statute was not to restrict the discretionary power of courts by requiring that consecutive sentences may only be given "before judgment on either." The statute is still colored with discretionary language (i.e., "the judgment may be. . ." and "imprisonment . . . may commence") which supports respondent's contention that judicial discretion in sentencing in this statute remains intact and unaffected.

Another consideration is the fact that under

the general legal and statutory principle of in pari materia, similar statutes must be read together for the aggregate, cumulative effect of each to be realized. Thus, reading Section 76-3-401 and 77-35-14 in pari materia, the only conclusion is that the lower court acted properly in ruling that appellant be sentenced consecutively with the offense he was presently serving.

The case of State v. Dodge, 19 Utah 2d 44, 425 P.2d 781 (1967), is supportive of this position. There, this Court was faced with a claim that the doctrine of concurrent and/or consecutive sentences had been wrongly applied. Appellant, sentenced under Utah Code Ann. § 76-1-18 (1953), as an "habitual criminal" with the potential of serving a life sentence, was given a consecutive sentence after he was later found guilty of first degree perjury. In construing Utah Code Ann. § 77-35-14 (1953), as amended (the same statute at issue here), this Court ruled that "[t]his section gives the court the right to make the sentences run consecutively instead of concurrently." 425 P.2d at 783.

It is important that in Dodge, the appellant, just as the appellant in the instant matter, was incarcerated in the Utah State Prison on a previous conviction when he was sentenced to a consecutive sentence for a later offense.

Yet, this Court specifically ruled that § 77-35-14 was no bar to a trial court's determination that a defendant may properly be given a consecutive sentence after a previous sentence has been pronounced.

Finally, it is respondent's view that common sense, public policy considerations of this case show that Judge Dee's sentencing decision was proper. The strong fact against appellant in this case, his past criminal history, the gravity and circumstances of the offenses and the appellant's character and rehabilitative possibilities all support the imposed consecutive sentence. Respondent submits that, under all these considered circumstances, appellant's consecutive sentence is appropriate and commensurate with the offense(s) committed. In fact, the imposition of a concurrent sentence here would not have been in the best interests of the State of Utah since appellant would have only been required to serve six months (May 23, 1979 to November 30, 1979) as opposed to eleven months for the Class A misdemeanor offense, to which appellant pleaded guilty.

The lower court's ruling also preserves the discretionary power of the judiciary in this area of

defendant sentencing. Respondent, therefore, urges this Court to reject appellant's second argument, as well, as being without merit.

CONCLUSION

Utah Code Ann. §§ 76-3-401 and 77-35-14 (1953, as amended), provide courts with the power to sentence a defendant convicted of multiple offenses to concurrent or consecutive sentences. This power is evident from the statutes, per se, and further supported by Utah case law. Respondent suggests that a careful review by this Court of the facts of this case and the statutes and case law authorities will result in the unavoidable conclusion that appellant was properly sentenced by Judge Dee.

Respondent asserts that this ruling of the lower court was proper and prays the verdict and sentence be affirmed.

Respectfully submitted,

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